United States Department of Labor
Employees' Compensation Appeals Board

T.C., Appellant	)	
and	)	**Docket No. 19-0227**
	)	**Issued: July 11, 2019**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, PORTLAND INTERNATIONAL AIRPORT, Portland, OR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 8, 2018 appellant filed a timely appeal from a September 12, 2018 merit decision and an October 22, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the October 22, 2018 decision, OWCP received additional evidence. Furthermore, appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a left trapezius strain causally related to the accepted factors of her federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 20, 2018 appellant, then a 26-year-old transportation security officer (screener), filed an occupational disease claim (Form CA-2) alleging that on or before June 15, 2018, she sustained cervical spine and left shoulder sprains due to her employment duties while staffing a security checkpoint. She stopped work on July 2, 2018.

In support of her claim appellant submitted a report dated July 20, 2018 by Dr. Loyal Douglas Marsh, a physician specializing in emergency medicine.[3] Dr. Marsh diagnosed a left trapezius strain. He noted that appellant had attributed her symptoms to pulling and pushing baggage through a security scanner at work. Dr. Marsh prescribed medication. In a duty status report (Form CA-17) of even date, Dr. Robert D. Thornton, a Board-certified family practitioner, noted work restrictions.

In a development letter dated July 30, 2018, OWCP informed appellant that the evidence submitted was insufficient to establish the claim. It advised her of the type of medical and factual evidence needed, including corroboration of the employment duties alleged to have caused the claimed condition, and a narrative report from her physician explaining how and why those events would cause that condition. OWCP afforded appellant 30 days to respond.

In response, appellant provided statements dated July 20 and September 2, 2018, attributing her neck and left shoulder symptoms to repetitive lifting, pulling, and pushing luggage through a security scanner at work. In a July 20, 2018 statement, V.E., an employing establishment manager, noted that at approximately 7:00 a.m. that day appellant had reported the onset of left shoulder and left-sided neck symptoms in mid-June 2018 while staffing the "ABC Checkpoint" at work. Two coworkers submitted statements dated July 21, 2018 indicating that appellant had complained of left shoulder pain while at work.

A July 20, 2018 attending physician's report (Form CA-20) by Dr. Thornton noted work restrictions and prescribed physical therapy. He opined that repetitive work activities were the "only potential cause" of appellant's left trapezius strain. In an August 22, 2018 report Dr. Marsh noted that physical therapy had improved appellant's neck and left shoulder symptoms.[4] Appellant also submitted reports dated through September 4, 2018 signed solely by Mr. Smith, the physician assistant, in which he returned appellant to work effective September 6, 2018. The employing establishment confirmed that appellant had returned to full duty on September 6, 2018.

[3] A physician assistant, Jeffrey Smith, also signed this report.

[4] Appellant participated in physical therapy treatments commencing August 21, 2018.

By decision dated September 12, 2018, OWCP denied appellant's occupational disease claim. It accepted her duties as a transportation security officer (screener) and diagnosis of left trapezius strain, but denied her claim because the medical evidence of record failed to establish that her diagnosed condition was causally related to the accepted employment duties.

On September 26, 2018 appellant requested reconsideration. She submitted physical therapy treatment notes dated from August 21 to 27, 2018.

By decision dated October 22, 2018, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant review of its September 12, 2018 decision. It found that the evidence submitted in support of her request were irrelevant to the claim.[5]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[6] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[7] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[8]

OWCP's regulations define the term "occupational disease or illness" as a condition "produced by the work environment over a period longer than a single workday or shift."[9] To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal

[5] In its October 22, 2018 decision, OWCP indicated that it did not receive Mr. Smith's September 4, 2018 work release form until after it had issued the September 12, 2018 decision. However, an examination of the case record demonstrates that OWCP received Mr. Smith's form report and imaged it into the integrated Federal Employees' Compensation System (iFECS) prior to issuance of the September 12, 2018 decision. The Board notes that OWCP's reference to the September 4, 2018 form in its October 22, 2018 decision is harmless error.

[6] *Supra* note 1.

[7] *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[8] *K.V.*, *id.*; *M.E.*, *id.*; *K.B.*, Docket No. 17-1997 (issued July 27, 2018).

[9] 20 C.F.R. § 10.5(q).

relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors.[10]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[11] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors(s) must be based on a complete factual and medical background.[12] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[13]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a left trapezius strain causally related to the accepted factors of her federal employment.

Dr. Marsh diagnosed a left trapezius strain caused by repetitive lifting, pulling, and pushing baggage while at work. While he provided an affirmative opinion on causal relationship, his opinion is insufficiently rationalized. Dr. Marsh failed to explain the pathophysiologic mechanism by which the accepted employment duties caused, aggravated, or accelerated appellant's left trapezius strain. Without explaining how the repetitive movements involved in appellant's employment duties caused or contributed to a left trapezius strain, his opinion on causal relationship is of limited probative value.[14] As such, his reports lack the specificity and detail needed to establish that appellant's left trapezius strain is the result of the accepted employment duties.[15]

In a duty status report (Form CA-17) dated July 20, 2018, Dr. Thornton approved work restrictions, but did not offer an opinion on causal relationship. As he did not provide a medical opinion that the accepted employment factors caused or aggravated the left trapezius strain, his opinion is of no probative value regarding causal relationship.[16]

Appellant also submitted reports by Mr. Smith, a physician assistant. These reports do not constitute competent medical evidence because a physician assistant is not considered a

[10] *K.V., supra* note 7; *M.E., supra* note 7.

[11] *K.V., supra* note 7; *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

[12] *K.V., supra* note 7; *Michael S. Mina*, 57 ECAB 379 (2006); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[13] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *id.*

[14] *K.V., supra* note 7.

[15] *Id.*; *M.E., supra* note 7.

[16] *S.S.*, Docket No. 18-1488 (issued March 11, 2019). *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

"physician" as defined under FECA.[17] Under FECA the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law.[18] Consequently, the medical findings and/or opinions of a physician assistant will not suffice for purposes of establishing entitlement to compensation benefits.[19]

The fact that a condition manifests itself during a period of employment is insufficient to establish causal relationship.[20] Temporal relationship alone will not suffice. Entitlement to FECA benefits may not be based on surmise, conjecture, speculation, or on the employee's own belief of a causal relationship.[21] Herein, the record lacks rationalized medical evidence establishing causal relationship between the accepted employment duties and appellant's left trapezius strain.[22] Thus, appellant has not met her burden of proof.

On appeal, appellant contends that new evidence accompanying her request for appeal was sufficient to meet her burden of proof to establish causal relationship. However, as previously noted, the Board may not consider evidence for the first time on appeal that was not before OWCP.[23]

Appellant may submit new evidence with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[24]

[17] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

[18] 5 U.S.C. § 8101(2).

[19] *S.S.*, *supra* note 16.

[20] *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[21] *S.G.*, Docket No. 18-1373 (issued February 12, 2019); *D.D.*, 57 ECAB 734 (2006).

[22] *M.H.*, *supra* note 20; *see J.S.*, Docket No. 17-0507 (issued August 11, 2017).

[23] 20 C.F.R. § 501.2(c)(1). *See supra* note 1.

[24] *Id*. at § 10.608(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.[25] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[26] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[27]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and she did not advance a new and relevant legal argument not previously considered. Accordingly, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

With her reconsideration request, appellant submitted physical therapy treatment notes dated from August 21 to 27, 2018. This evidence, while new, is not relevant to the underlying medical issue. Physical therapists are not considered physicians as defined under FECA and thus their reports do not constitute competent medical evidence.[28] Evidence which does not address the particular issue under consideration does not constitute a basis for reopening a case.[29] Thus, appellant is not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.[30]

[25] 20 C.F.R. § 10.607(a).

[26] *Id*. at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[27] *Id*. at § 10.608(b); *H.H.*, *supra* note 24; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[28] *See David P. Sawchuk*, *supra* note 17 (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law). *J.L.*, Docket No. 17-1207 (issued December 8, 2017); *F.L.*, Docket No. 17-0528 (issued June 6, 2017); *G.C.*, Docket No. 16-0681 (issued October 18, 2016); *J.M.*, 58 ECAB 448 (2007); *G.G.*, 58 ECAB 389 (2007) (physical therapists are not considered physicians under FECA).

[29] *See F.B.*, Docket No. 18-1039 (issued December 6, 2018).

[30] *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a left trapezius strain causally related to the accepted factors of her federal employment. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 22 and September 12, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 11, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board